

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2170

To be argued by
CHARLES E. PADGETT

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2170

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES MITCHELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES MITCHELL,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James Mitchell appeals from a judgment of conviction entered on July 9, 1974, in the United States District Court for the Southern District of New York, after a 3 day trial before the Honorable Richard Owen, United States District Judge, sitting without a jury.

Indictment 74 Cr. 265, was filed in two counts on March 18, 1974. Count One charged Mitchell with attempted evasion of his personal income tax for the calendar year 1971 in violation of Title 26, United States Code, Section 7201. Count Two charged Mitchell with failure to file an individual income tax return for the same year in violation of Title 26, United States Code, Section 7203.

The case was tried from July 1 to July 3, 1974. Judge Owen reserved decision and on July 9, 1974 found Mitchell guilty on both counts.

On August 29, 1974, Judge Owen denied a motion for a new trial and sentenced the defendant to a term of 3 years imprisonment on Count One to run concurrently with a term of 1 year imprisonment on Count Two. The defendant also was fined \$10,000 on each count, making a total of \$20,000, and was ordered to pay the costs of prosecution.

Mitchell's motion for bail pending appeal was denied, and he is now serving his sentence.

Statement of Facts

The Government's Case

The Government proved at trial that Mitchell earned approximately \$11,000 in taxable income during the calendar year 1971, \$10,000 of it as a pimp. The proof further showed that Mitchell failed to file an income tax return for that year and wilfully evaded paying the tax that was due.

(a) *Proof of Receipt of Income.* Nancy Sauer testified that she met Mitchell in a bar in Montreal in May 1971, when she was working in Canada as a prostitute. Mitchell and Sauer discussed girls, whom they both knew, who were prostitutes in New York (119a),* Sauer told Mitchell she was a prostitute, and Mitchell asked Sauer to accompany him to New York City (121a). Mitchell gave Sauer the \$50 fare, and she flew to New York City with him (122a-123a).

* Page references with an "a" refer to the trial transcript as reproduced in defendant's appendix.

Sauer went with Mitchell to his apartment in Manhattan and immediately began working for him as a prostitute (125-126a). She lived with Mitchell for two months, working as a prostitute each night at his direction. Sauer earned \$150 a night as a prostitute, turned all this money over to Mitchell, and received in return from him approximately \$10 a day as "expense money" (127-128a).

After living in Mitchell's apartment for two months, Sauer moved to "another one of his apartments" and lived there for one more month, working for him as a prostitute on the same terms (129a). Thus, Sauer worked as a prostitute for Mitchell from June through August 1971 and paid him approximately \$10,000.*

Susan Hall, author of a book about Mitchell entitled *Gentleman of Leisure* (161a), paid \$1,000 in cash to Mitchell in December, 1971 (338a) as a royalty on the book.**

Roosevelt Bell, an admitted pimp who had known Mitchell for many years, testified to a conversation with Mitchell in 1971 in which Bell complained to Mitchell that Mitchell owed Bell money because Mitchell had stolen one of Bell's prostitutes. Mitchell replied that "she was his woman and he didn't cop her from" Bell. Translated from pimp jargon, this meant that the girl had been work-

* Sauer also identified several photographs in *Gentleman of Leisure*, a book about Mitchell's pimping activities, including photographs of herself and her sister and of another prostitute who took her out to work during her first night in New York (131-37a; GX 18-22).

** The Government proved that the \$1,000 was a royalty payment by showing that on July 17, 1972, after Mitchell had set up a corporation to receive royalty payments from Miss Hall, the corporation provided Miss Hall with a receipt (GX 14) purporting to show that she had delivered to the corporation the \$1,000 which she, in fact, had given to Mitchell in 1971 (321-323a).

ing for Mitchell and had given him money, and that he had not stolen her from Bell (347a-359a).

(b) *Proof of Willfulness.* The Government proved at trial that Mitchell lived in an apartment in New York under the name Charles Dunbar from 1969 through April 1973 (11-12a, 25-28a; GX 2), and that he used the same false name to open a bank account (GX 10-11). The Government further proved that rental payments for Mitchell's apartment were frequently made in cash (12-13a, 22-23a; GX 3), and that Mitchell bought a Rolls Royce in 1971 by trading in an old Rolls Royce and paying \$1,000 in cash (62a, 70-71a; GX 4-8).^{*} Finally, IRS Special Agent John Clarke testified that Mitchell falsely stated to him that he had filed income tax returns (399a, 426-27a; GX 30).

(c) *Proof of Failure to File.* Mitchell stipulated that a search of the pertinent records of the Internal Revenue Service disclosed no record of filing from 1970 through 1972.

The Defense Case

Mitchell presented no evidence on his own behalf.

^{*} When the car was purchased, Mitchell was accompanied by one Donna Mitchell, in whose name the car was bought (63-64a). Mitchell now claims that Donna Mitchell is his mother, and actually owned the car. However the record shows that Mitchell paid the cash, and described the car as 'his car' in a subsequent dealing with the car salesman (70a).

ARGUMENT

POINT I

The District Court properly denied Mitchell's motion for a new trial based upon a frivolous claim of newly discovered evidence.

Mitchell says that the District Court erred in denying his motion for a new trial, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure. However, the matters alleged in support of the motion did not meet the prerequisites for the granting of a new trial, *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958), and Judge Owen's decision was obviously correct.

Mitchell was accused and convicted of income tax evasion and failure to file a tax return for the calendar year 1971, based on his receipt of \$11,000 in income during that year. His motion alleged that beginning on July 17, 1972, he had conversations with Susan Hall, author of *Gentleman of Leisure*, and a law firm called Pravda and Golub, concerning the handling of royalties on the book. Mitchell further alleged that after he had learned of the IRS fraud investigation in May, 1973, he retained another firm, Bandler and Kass, to represent him before the IRS. Mitchell complains that despite the fact that he told Bandler and Kass to "ascertain whether a tax problem did exist, and if so . . . to resolve it" (629a), all Bandler and Kass did for him during the IRS investigation was to assure him that "there was nothing to worry about." Finally, Mitchell asserts that Bandler and Kass, who represented him at trial, maliciously withheld evidence of his 1972 conversations with Miss Hall and with Pravda and Golub and of his cooperative spirit after he discovered

that IRS was investigating him, in order to cover up their own incompetence in not somehow using these alleged facts to keep Mitchell from being indicted in the first place.

Even assuming the truth of these bizarre allegations,* Mitchell's argument that they require a new trial is simply silly. All Mitchell said in his supporting affidavit about his conduct when he learned of the IRS investigation in 1973 was that he hired an attorney, told him to resolve the problem, and intended to "cooperate and comply" (629a). Whether or not a subsequent offer to pay taxes owed may ever be received on the issue of wilful evasion, see *Hayes v. United States*, 227 F.2d 540 (10th Cir. 1955), what Mitchell says he did and thought in 1973 proves absolutely nothing about whether his failure to file and pay taxes on \$11,000 of income earned in 1971 income was wilful. Similarly, whatever conversations Mitchell, Hall and Golub and Pravda may have had in or after July 1972 about the handling of royalties for Mitchell could not have affected Mitchell's state of mind in not reporting on a tax return prior to those conversations the \$1,000 in cash which he had received from Susan Hall in 1971.

Most important, however, the allegation of newly discovered evidence of "incompetence" was simply a trumped up charge. If it ever occurred at all to Mitchell's trial counsel that he might offer such irrelevant proof at the trial, the trial court was doubtless correct in concluding that counsel's motive for not doing so was not the corrupt concealment of prior incompetence alleged by Mitchell, but simply the tactical choice that Mitchell would have a better chance of winning if Mitchell were kept off the stand and Susan Hall resisted telling about her conversations with Mitchell on First Amendment grounds (547a).

* The essential allegation made by Mitchell were vigorously denied in an affidavit submitted by his trial counsel (654-662A).

At most, counsel's decision not to offer the irrelevant evidence was a matter of trial strategy which this Court has warned "is not to be ignored." *United States v. West*, 494 F.2d 1314, 1315 (2d Cir. 1974); see *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963).

POINT II

The evidence of Mitchell's guilt was more than sufficient.

Mitchell claims that the evidence was insufficient to establish his guilt because Nancy Sauer's testimony was not believable and because the proof of willfulness was allegedly inadequate. Both branches of the argument are frivolous.

The short and dispositive answer to Mitchell's complaint about Ms. Sauer's credibility is that the determination of this question was exclusively within the province of Judge Owen, sitting as of the trier of the facts, and is not subject to review by this Court. See *United States v. Mallah*, Dkt. No. 74-1327 (2d Cir., September 23, 1974), slip op. 5475 at 5489; *United States v. Brown*, 335 F.2d 170, 172 (2d Cir. 1964).

Mitchell's challenges to the Government's proof of willfulness are meritless. The Government proved that Mitchell employed false names and cash transactions to conceal his unreported income. Such conduct is familiar evidence of willfulness in income tax evasion prosecutions. *Spies v. United States*, 317 U.S. 492, 499 (1942); *United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969); *United States v. Marquez*, 332 F.2d 162, 166 (2d Cir. 1964); *Chinn v. United States*, 228 F.2d 151, 154 (4th Cir. 1955). Thus, the Government offered in evidence three leases for Apartment 17-G at 145 Fourth Avenue, New York, New

York covering the period from 1969 through 1973, which were signed by the lessee in the name of "Charles Dunbar" (GX 1-3, 7a-24a). A New York City police officer, who lived during this period in the apartment adjacent to Apartment 17-G, identified Mitchell as one of the men who occupied Apartment 17-G and testified that Mitchell answered to the name "Charles Dunbar" (26a-27a). The leases were properly authenticated, and an adequate foundation was provided for their admission as business records under 28 U.S.C. § 1732.

Mitchell complains that there was no direct evidence that he signed the name "Charles Dunbar" on the leases.* It is clear, however, that circumstantial evidence beyond the four corners of a document may point with sufficient certainty to the person who authored or signed it. *United States v. Sutton*, 426 F.2d 1202, 1207 (D.C. Cir. 1969); *United States v. King*, 472 F.2d 1, 8 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973); *United States v. Kelly*, 349 F.2d 720, 724 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504, 513 (S.D.N.Y. 1951). Here, the police officer's testimony that Mitchell lived in the apartment covered by the leases during the period in question and answered to the name "Charles Dunbar" was sufficient evidence to permit the inference that Mitchell or someone acting with his authority had signed the leases under that name. On the other hand, the leases also were admissible as circumstantial evidence corroborating the police officer's testimony that Mitchell used the alias "Charles Dunbar" while living in the apartment.

* Mitchell notes that when the policeman asked him for identification on January 17, 1973, he disclosed his true name by producing a driver's license in the name of James Mitchell. In arguing that "this certainly is not the conduct of one who is attempting to use a pseudonym" (Br. at 28), appellant omits mentioning that this disclosure was prompted by his arrest by the police officer on that occasion (55a).

The Government also offered proof that Mitchell opened a bank account in the name of "Charles Dunbar." Two account cards from the Central Savings Bank, located at 145 Fourth Avenue in the building where Mitchell lived, were admitted in evidence (GX 10, 12). One of the accounts was opened in 1972 in the name of James Mitchell. The other was opened in 1969 in the name of "Charles Dunbar." Both account cards listed the residence of the depositor as 145 Fourth Avenue, and both stated that the depositor's parents' names were "Donna" and "James." Contrary to appellant's contention, the Government provided a sufficient foundation for the admission of these records into evidence (80a-81a, 85a-86a), and together they unquestionably constituted persuasive circumstantial proof that Mitchell was the "Charles Dunbar" who opened the 1969 account.

POINT III

The verdict and sentence were not impaired by bias or inadmissible evidence.

Mitchell claims that the verdict and sentence in his case were the product of bias or inadmissible evidence, because Judge Owen examined *Gentleman of Leisure* during the trial, and expressed awareness at sentence of statements made by appellant on radio and television about his earnings. The complaint is utterly frivolous.

Judge Owen examined the book during the trial solely for the purpose of ruling on its author's contentions concerning journalistic privileges (312a-313a, 379a). In any event Mitchell does not point to anything in the book which might have prejudiced the Trial Court on the issues of whether Mitchell, who was shown to be a pimp by other evidence at the trial, had evaded taxes or failed to file a return. Nor does he claim that the book contains inaccurate information about him.

As for Judge Owen's comments at sentence about Mitchell's radio and television admissions concerning his earnings, it was obviously appropriate for him to have access to those remarks before sentence. *Williams v. New York*, 337 U.S. 241 (1949). In any event, Judge Owen did not consider these broadcasted remarks as a factor in determining Mitchell's sentence, but only as a circumstance, relevant to the new trial motion, which suggested that Mitchell may have sought counsel in 1973 because he knew IRS might have taken note of his public statements about his earnings (556a-557a).

POINT IV

Mitchell's Fifth Amendment claims are without merit.

Mitchell claims that a false exculpatory statement he made to an IRS agent that he had in fact filed his returns and an admission he made to a New York City police officer that he was a pimp should not have been admitted in evidence because he did not receive full *Miranda* warnings in each instance. *Miranda v. Arizona*, 384 U.S. 436 (1966). Neither claim has any merit.

During the grand jury investigation which preceded Mitchell's indictment, the IRS Special Agent investigating the case served a subpoena on a prostitute in a hotel room, and found Mitchell with the prostitute. The Special Agent told Mitchell that he would like to ask him something, but said that he knew Mitchell had an attorney, that Mitchell did not have to answer and could "tell [him] to get the hell out of here", and that whatever Mitchell did say could be used against him. Mitchell kept saying "Yes, I understand," and then answered the Special Agent's question about where he had filed (397a-399a).

No warning whatsoever was required in this wholly non-custodial situation. *United States v. White*, *supra*, 417 F.2d at 91; *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *United States v. Marcus*, 401 F.2d 563, 566 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *United States v. Mackiewicz*, 401 F.2d 219, 221 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968); *United States v. Squieri*, 398 F.2d 785, 789-790 (2d Cir. 1968); *United States v. Robson*, 477 F.2d 13, 16 (9th Cir. 1973); *Simon v. United States*, 421 F.2d 667, 668 (9th Cir.), *cert. denied*, 398 U.S. 904 (1970). In any event, the only element of the complete *Miranda* warning which was lacking was a caution that Mitchell could consult with his lawyer before answering the question if he wished. However, that was certainly obvious in view of the fact that the Special Agent had no physical control over Mitchell at all, had indicated his awareness that Mitchell had a lawyer, and twice cautioned Mitchell that Mitchell could simply tell him to leave (397a).

On another occasion the police officer who lived next door to Mitchell found Mitchell and a young woman having a dispute in the hallway. The woman was bleeding from the mouth, and the policeman, who was out of uniform, asked the two if they wished to come into the apartment to "settle the dispute." The two agreed, and while Mitchell was in his apartment, the policeman complained about the fact that Mitchell was keeping him awake by playing loud music. In reply, the policemen testified that Mitchell

"stated to me that he was a pimp, and he knew I was a policeman, and that I would have to change my hours to coincide with his" (29a-31a).

The introduction of this completely volunteered, non-custodial statement, which added almost nothing to the Government's case in any event, did not violate appellant's Fifth Amendment privilege against self-incrimination. See *United States v. Vigo*, 487 F.2d 295, 299 (2d Cir. 1973).

POINT V

Mitchell's First Amendment claim is frivolous.

Mitchell asserts the entirely frivolous claim that the Trial Court infringed his First Amendment rights when it required Susan Hall, the author of *Gentlemen of Leisure*, to testify about cash payments to and royalty agreements with Mitchell.

Gentlemen of Leisure describes a pimp's life. Although the book refers to its subject only as "Silky", Mitchell's photograph appears on the cover and throughout the book and is identified as being that of "Silky" (GX 27). After the Trial Court denied her claim of privilege (310a-312a), Miss Hall identified Mitchell as the man to whom she paid \$1,000 in 1971, and with whom she entered into certain royalty agreements in 1972 (337a-342a).

The Trial Court's ruling was plainly correct. First, the Supreme Court has held that a newspaperman may not refuse to answer before a grand jury questions relating to criminal conduct he has observed, even though answering such questions may necessitate the disclosure of a confidential source.* *Branzburg v. Hayes*, 408 U.S. 665 (1972). Second, even assuming *arguendo* that the person who gave the information has the same standing to raise a First Amendment claim as the newspaperman, Mitchell's case does not even present an issue of disclosure of a confidential source, since the publication of *Gentlemen of Leisure*

* *United States v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972) indicates that the inevitable public disclosure of confidential source information at a trial may require a showing by the Government of need for the testimony which would not be required in the case of a secret grand jury proceeding. Assuming the *Liddy* approach to be correct, Miss Hall was in any event the only witness available to the Government to prove that she paid \$1,000 to Mitchell in 1971 (311a).

with Mitchell's picture identified throughout as the "hero" of the book had already branded him as the source of Miss Hall's story. See, *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972).*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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* The New York Shield Law, N.Y. Civil Rights Law § 79-h (McKinney Supp. 1973) is inapplicable since neither Miss Hall nor *Gentleman of Leisure* fall within its protective mantle. See §§ 79-h(a)(6), (7), (8) and (b). Furthermore, the statute does not confer any rights upon Mitchell which could have been invoked in this case.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JUNE H. DOBSON

deposes and says that she is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 18th day of October, 1974
she served a copy of the within brief
by placing the same in a properly postpaid franked
enveloped addressed:

Stein and LaGreco, P.C.
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And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

June H. Dobson

Sworn to before me this

18 day of October 1974

Charles E. Fagatt
Notary Public
Columbia City
Com Op 30 Mar 76